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VIA COURIER

EX PARTE

September 21, 2009

ORIGINAL

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A325
Washington, DC 20554

Re: *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area, WC Docket No. 09-135*

Dear Ms. Dortch:

Please find enclosed two redacted copies of the Opposition of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp. ("Opposition") for filing in the above-referenced docket. One redacted copy of the Opposition will also be provided electronically to the Competition Policy Division of the Wireline Competition Bureau and to Best Copy and Printing, Inc. One original confidential and highly confidential Opposition is being filed with the Secretary's Office under separate cover. Pursuant to the First and Second Protective Orders in this proceeding, two copies of the confidential and highly confidential Opposition will be filed with Gary Remondino and one copy of the confidential and highly confidential Opposition will be provided electronically to Tim Stelzig and Denise Coca.

Please do not hesitate to contact me if you have any questions with respect to this submission.

Respectfully submitted,



Thomas Jones
Jonathan Lechter
Nirali Patel

*Attorneys for Integra Telecom, Inc., tw telecom inc.,
Cbeyond, Inc., and One Communications Corp.*

Enclosures

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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Petition of Qwest Corporation for Forbearance)	WC Docket No. 09-135
Pursuant to 47 U.S.C. § 160(c) in the Phoenix)	
Metropolitan Statistical Area)	
)	

**OPPOSITION OF INTEGRA TELECOM, INC., TW TELECOM INC., CBeyond, INC.,
AND ONE COMMUNICATIONS CORP.**

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September 21, 2009

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**OPPOSITION OF INTEGRA TELECOM, INC., TW TELECOM INC., CBEYOND, INC.,
AND ONE COMMUNICATIONS CORP.**

Integra Telecom, Inc. ("Integra"), tw telecom inc. ("tw telecom"), Cbeyond, Inc. ("Cbeyond"), and One Communications Corp. ("One Communications") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit this opposition to the petition for forbearance from unbundling and other regulations ("Petition")¹ filed by Qwest Corporation ("Qwest") in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY.

This proceeding is unfortunately the product of a line of flawed FCC decisions that have apparently given Qwest the impression that the level of competition in the Phoenix metropolitan statistical area ("MSA") is sufficient to justify forbearance from loop and transport unbundling requirements in that area. Most recently, in the *4-MSA Order*, the FCC correctly rejected Qwest's forbearance request, but it indicated that, under the standard of review applied in the

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Dkt. No. 09-135 (filed Mar. 24, 2009) ("Petition").

² See *Pleading Cycle Established for Comments on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, Public Notice, DA 09-1653, WC Dkt. No. 09-135 (rel. July 29, 2009).

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order, that a more reliable factual record might allow Qwest to prove that the level of competition in Phoenix is sufficient to warrant forbearance from unbundling. In particular, the FCC repeated its practice of including “cut the cord” wireless customers in its assessment of competitors’ market share in the residential telephone market, and it indicated that a more reliable estimate of the cut-the-cord customers in Phoenix might show that there is enough competition in Phoenix to justify forbearance from residential loop unbundling and possibly even all loop and transport unbundling in Phoenix. Qwest therefore filed the instant petition in an attempt to meet the standard applied in the *4-MSA Order*.

But the FCC is now revisiting that standard in a companion proceeding in which it is reassessing both the *6-MSA Order* and the *4-MSA Order* in light of the D.C. Circuit’s decision in *Verizon v. FCC*. In that decision, the court remanded the *6-MSA Order*, in which the FCC applied the same standard it applied in the *4-MSA Order*. The remand prompted the FCC to request, and receive, a voluntary remand of the *4-MSA Order*. In *Verizon v. FCC*, the court held that the FCC had failed to explain why it considered only the level of actual competition (*i.e.*, the incumbent’s market share in the residential telephone market) instead of actual and potential competition, as it had in past UNE forbearance petitions. But the court emphasized that the FCC has broad discretion to adopt an analytical framework under Section 10, so long as it explained why the standard is reasonable.

As the Joint Commenters explained in comments filed in the remand proceeding, the FCC should now replace the flawed standard applied in the *6-MSA Order* and the *4-MSA Order* with a standard of review that hews closely to basic principles of competition policy and the FTC-DOJ Horizontal Merger Guidelines. Indeed, the standard applied in the *4-MSA Order* suffers from several basic deficiencies, such as the practice of including “cut the cord” wireless

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in the residential landline telephone market without any basis for doing so and the practice of relying, at least to some extent, on a market share test in the residential telephone market as a basis for determining whether to grant forbearance in the business market.

Accordingly, both in the remand proceeding and in this proceeding, the FCC should apply a new standard under which it begins by (1) defining product markets based on customer demand patterns, at the very least assessing residential services and business services separately and wholesale and retail markets separately; and (2) utilizing MSAs as the relevant geographic area for analyzing UNE forbearance petitions. In assessing the level competition within the relevant market, the FCC should presume that potential competitive entry is irrelevant to the competition analysis because such entry is not likely to be timely or sufficient to constrain the incumbent's exercise of market power in local wireline telecommunications markets. The FCC should focus instead on whether the level of actual competition is sufficient to prevent Qwest from charging prices above cost in a relevant market as a result of unilateral conduct or as a result of coordinated conduct with one or more competitors. In determining whether this the case, the Commission should require that Qwest face competition from at least two competitors (in some markets more may be required) that utilize their own loop facilities to provide service and that at least two competitors with their own loops have garnered substantial market share (e.g., 15 percent). The Commission should also consider whether the incumbent possesses substantial and persisting cost advantages as compared to competitors.

If these principles are applied to the Phoenix market, it is clear that Qwest's petition should be denied. *First*, there is no evidence that competitors of any kind have deployed extensive loop facilities to business customer locations in the Phoenix MSA. Past Commission decisions confirm this point, as do the analyses of loop deployment in the Phoenix MSA

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appended hereto by Integra and tw telecom executives. As those analyses confirm, competitors are unable to deploy loop facilities to a significant number of commercial buildings in Phoenix. Moreover, tw telecom's analysis of possible future loop deployment confirms that there is no basis for rebutting a presumption that potential competitive entry is unlikely to be timely or sufficient enough to constrain Qwest's exercise of market power in the business market.

The information Qwest proffers in support of its assertion that the business market is competitive cannot withstand scrutiny. Qwest relies on GeoTel data regarding the number of buildings served by competitors, but that data just confirms that competitors' networks reach a **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** of the commercial buildings in the Phoenix MSA. Qwest submits maps depicting deployment of competitive fiber, route mile totals and competitors' promotional statements, but the FCC has already correctly concluded that this information is unreliable.

As evidence of competition in the business wholesale market in particular, Qwest relies primarily on the wholesale offerings of Cox, SRP Telecom and AGL Networks. But as Integra explains, Cox is not a viable alternative to Qwest for the wholesale loops needed to serve Integra's business customers in the Phoenix MSA. Furthermore, as Qwest's own petition states, the SRP and AGL networks are extremely limited; combined, those two firms serve only 114 buildings in the entire Phoenix MSA. Moreover, the other wholesale competitors in the Phoenix MSA also have extremely limited networks.

Nor is there sufficient facilities-based competition to constrain Qwest's exercise of market power in the provision of downstream retail business services provided by competitors *via* unbundled loops. No competitor in the retail market, including even Cox, appears to have deployed loop facilities to a significant percentage of commercial end user locations. Qwest

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relies on a Harte-Hanks study of the business retail market, but that study is irrelevant because it includes competitors that rely on the very unbundled loop facilities that Qwest seeks to eliminate. Qwest's assertions regarding Cox's retail offerings are based on a single magazine article and Cox's selection as the telecommunications vendor for the 2008 Super Bowl in Phoenix, neither of which is obviously a credible basis for concluding that Cox has a significant presence in the retail business market in Phoenix.

Second, there is no basis for concluding that multiple competitors compete in the residential wireline voice or residential wireline broadband markets in Phoenix. Although the FCC has in past orders included residential consumers who have "cut the cord" in its market share analysis for residential wireline telephone services, it has never provided any analytical support for this approach. In particular, the Commission has never undertaken an analysis of the extent to which the availability of wireless services constrains the price of wireline voice services. Nor is there any reason to believe that such an analysis would support the inclusion of mobile wireless telephone service in the wireline telephone service product market. This is because the relevant inquiry in a product market analysis would be whether a hypothetical monopolist could profitably increase prices for those customers who continue to purchase wireline service. Customers who have cut the cord are irrelevant to the analysis. Furthermore, Qwest has not provided any analysis of the effect of wireless services on its pricing decisions for wireline telephone service. There is therefore no basis for including wireless telephone service in the wireline telephone service product market. Moreover, not even Qwest has attempted to assert that mobile wireless broadband belongs in the residential wireline broadband market; clearly it does not.

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Once the residential product markets are properly defined, it is clear that there is insufficient competition in such markets to warrant forbearance from unbundling. Cox is the only facilities-based competitor that Qwest faces in either the residential wireline telephone or the residential wireline broadband market. Given that a duopoly market structure is highly likely to yield prices well above costs, there is no basis for granting forbearance in any residential market.

Third, there is no basis for concluding that facilities-based competition in the provision of interoffice transport has developed on routes where Qwest retains unbundling obligations. Based on an Integra market study, competitive wholesale providers offer service exclusively on routes where the Commission's rules already eliminate all or some of Qwest's unbundling obligations. There is no such competition on routes that are subject to full interoffice transport unbundling requirements.

II. THE COMMISSION SHOULD APPLY SOUND PRINCIPLES OF COMPETITION POLICY IN ASSESSING COMPETITION IN PHOENIX.

In comments filed in the remand of the *6-MSA Order* and the *4-MSA Order*, the Joint Commenters explained that the recent D.C. Circuit decision in *Verizon v. FCC* confirms that the Commission has substantial discretion in determining the appropriate standard of review of UNE forbearance petitions.³ As the Joint Commenters have explained, the standards that the Commission has applied in past UNE forbearance orders have suffered from numerous fundamental flaws, including the failure to properly define product markets, the failure to properly assess the likelihood of potential future competitive entry and the failure to account for

³ See Comments of Cbeyond, Integra, One Communications and tw telecom, WC Dkt. Nos. 06-172 & 07-97, at 7-8 (filed Sept. 21, 2009) ("Remand Comments") (discussing *Verizon v. FCC*, 570 F.3d 294 (D.C. Cir. 2009)).

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the consequences of a duopoly market structure.⁴ Accordingly, the Joint Commenters urged the Commission in the future to apply a standard of review that avoids these problems and that otherwise hews closely both to the terms of Section 10 and the basic principles for assessing the level of competition in a market as set forth in the FTC-DOJ Horizontal Merger Guidelines.⁵

First, the Commission should define product markets based on customer demand patterns. To begin with, this means differentiating residential services from business services. As the Joint Commenters have demonstrated elsewhere, the characteristics (prices, service characteristics, cost of providing service, and so on) of even the most basic telephone services are fundamentally different for business versus residential telephone and broadband services.⁶

⁴ See, e.g., “Factual and Legal Support for Competitors’ Proposed UNE Forbearance Standard,” at 2-8, *attached to* Letter from Thomas Jones, Counsel for One Communications Corp. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49 (filed Apr. 14, 2009) (“Joint Commenters’ April 14th UNE Forbearance Ex Parte Letter”) (detailing the problems with the analytical framework that the FCC has used to review incumbent LEC petitions for forbearance from unbundling requirements).

⁵ See Remand Comments at 17-32.

⁶ See Joint Commenters’ April 14th UNE Forbearance Ex Parte Letter at 13-16 (explaining that: (1) the service features and characteristics demanded by and marketed to even the smallest business customers are qualitatively different from those demanded by and marketed to residential customers; (2) the differences in the levels of customer support and features demanded by residential and small business customers are reflected in the different prices charged for those services; (3) competitors’ practices for marketing and advertising to small business customers are different than would be the case if they sought to acquire residential customers; (4) competitors such as Integra and One Communications provide more proactive and personalized customer service to their business customers than they would if they served residential customers; and (5) competitors that serve only business customers must design their networks differently than would be the case if they served residential customers).

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Moreover, the FCC must also separately assess retail services from wholesale services. As the Joint Commenters explained in the Remand Comments, the demand characteristics of these two markets are fundamentally different.⁷

Second, the Commission must select a geographic area for purposes of the forbearance analysis. The most appropriate geographic area for these purposes is an MSA because competitors who rely on UNEs must obtain access to those facilities throughout an MSA in order to achieve profitability and to serve a community of interest.⁸ This is the case with the Phoenix MSA. For example, Integra determines the boundaries of the geographic areas it will serve based on several factors, including the minimum number of business locations that it must serve in order to recover the substantial fixed costs associated with market entry and to ultimately achieve profitability.⁹ As Integra's Vice President of Sales, Byron Cantrall, explains, other factors include the locations of businesses and office parks and the proximity of fiber and central offices to those businesses and offices parks; the amount of time it takes for Integra's sales associates and network engineers to reach customers; and the ability of those personnel to use the highway system to meet with customers and maintain Integra's network.¹⁰ Integra has found that

⁷ See Remand Comments at 16.

⁸ See Remand Comments at 16-17 & n.34 (citing Joint Commenters' April 14th UNE Forbearance Ex Parte Letter at 9-11) (explaining that CLECs that purchase wholesale inputs to provide downstream retail services can generally achieve minimum efficient scale only if they serve geographic areas that are approximately the size of an MSA and that, accordingly, the competitive effects of eliminating UNEs should be assessed on an MSA basis).

⁹ Declaration Of Byron S. Cantrall On Behalf Of Integra Telecom, Inc. ¶ 4 (Sept. 21, 2009) (attached hereto as Attachment A) ("Cantrall Declaration").

¹⁰ *Id.* ¶ 5.

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MSAs tend to encompass these driving and communications patterns.¹¹ In addition, Integra derives a significant percentage of its revenues from business customers that have multiple locations within the same urban area, thus again reinforcing the need for Integra to establish an MSA-wide network footprint.¹² Based on an analysis of these factors, Integra has determined that, it must be able to serve the small and medium-sized businesses throughout the Phoenix MSA in order to reach and sustain overall profitability.¹³

Third, the FCC must carefully assess the level of competition in each relevant market. As the Joint Commenters explained in the Remand Comments, the Commission can do this by either applying the standard proposed by a coalition of competitors¹⁴ or by applying the FTC-DOJ Horizontal Merger Guidelines. Under the competitors' Proposed Standard, a UNE forbearance petition would be granted only in MSAs where the following conditions are met:

(1) at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market ("Wholesale Test");

or

¹¹ *Id.*

¹² *Id.* ¶ 4.

¹³ *Id.* ¶ 6.

¹⁴ See Letter from A. Lipman et al., Counsel for Alpheus Communications, L.P. et al., to Marlene H. Dortch, Secretary, FCC, *In re Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Dkt. No. 08-24; *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Dkt. No. 08-49 (filed Mar. 26, 2009) (setting forth "Proposed Standard").

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(2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market ("Retail Test").¹⁵

This Proposed Standard could be used as a bright line test. Alternatively, the FCC could use it as a presumption test under which an MSA that meets the criteria would be presumed to be eligible for forbearance whereas an MSA that does not meet the criteria would be presumed to be ineligible for forbearance.¹⁶

Alternatively, the Commission could decide to undertake a market competition analysis, under which an MSA would be eligible for forbearance in any product market in which the incumbent retains the ability, either unilaterally or as a result of coordinated conduct, to set prices above cost in an MSA. To make this determination, the Commission would need to assess the prospect of potential future competitive entry based on whether it is likely, timely and sufficient under the FTC-DOJ Horizontal Merger Guidelines.¹⁷ As the Joint Commenters have explained, it is extremely unlikely that the FCC could ever conclude that potential future

¹⁵ See Joint Commenters' April 14th UNE Forbearance Ex Parte Letter at 16-18 (explaining why (1) under the Proposed Standard, a facilities-based non-ILEC competitor must be a *wireline* provider in order to qualify as a competitor; (2) under the Proposed Standard, each competitor must have captured at least 15 percent of the market share in the relevant product market; (3) under the Wholesale Test of the Proposed Standard, each facilities-based non-ILEC wireline competitor must have *actually deployed* end-user connections to 75 percent of the relevant end-user locations in an MSA; (4) under the Wholesale Test, each facilities-based non-ILEC wireline competitor must have developed sufficient wholesale operations support systems to accommodate the wholesale demand in the relevant product market; and (5) under the Retail Test of the Proposed Standard, at least 75 percent of end-user locations must be served by two or more facilities-based non-ILEC wireline competitors using loops that the competitors have actually deployed).

¹⁶ See Remand Comments at 19.

¹⁷ See *id.* at 20-23.

competitive entry meets this standard.¹⁸ The Commission should therefore presume that only actual competition is relevant to the market competition analysis.

In assessing actual competition, the FCC should require that Qwest face competition from at least two competitors (in some markets more may be required) that utilize their own loop facilities to provide service throughout the MSA and that at least two competitors with their own loops have garnered substantial market share (e.g., 15 percent). The Commission should also consider whether the incumbent possesses substantial and persisting cost advantages as compared to competitors.¹⁹

III. THERE IS NO BASIS FOR GRANTING FORBEARANCE FROM UNBUNDLING REQUIREMENTS APPLICABLE TO LOOPS NEEDED TO SERVE BUSINESS CUSTOMERS IN THE PHOENIX MSA.

There is very limited facilities-based competition in the business market in the Phoenix MSA. This conclusion is supported by the FCC's own recent analysis of the market, the information submitted by Qwest in support of its petition, competitors' own experience in seeking to deploy loop facilities as well as the available evidence concerning the level of competition in the wholesale and retail markets in particular. It is clear that Qwest does not face anything close to the kind of widespread facilities-based competition from multiple competitors that is required to constrain its ability to charge above-cost prices and otherwise exercise its market power in the business market. This is true for all types of services demanded by business customers, thereby obviating the need in this proceeding to define distinct product markets among the services demanded by business customers in Phoenix.

¹⁸ See *id.* at 24-26.

¹⁹ See *id.* at 27.

A. Competitors' Deployment Of Loop Facilities To Business Locations In The Phoenix MSA Is Extremely Limited.

All of the available evidence indicates that Qwest owns the only local transmission facilities serving the vast majority of business locations in the Phoenix MSA. For example, in 2006, the Government Accountability Office ("GAO") examined competitive deployment of loop facilities to commercial buildings in 16 MSAs, including Phoenix, and found that competitors had deployed loop facilities to only 3.7 percent of buildings with demand of DS1 or greater in the Phoenix MSA.²⁰ The following year, in the *Qwest 272 Sunset Order*, the FCC found more generally that Qwest retained control of essential transmission facilities in its operating territory,²¹ including Arizona. The Commission expressly held that "Qwest continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities."²²

Most recently, in the *4-MSA Order*, the FCC found that the record failed to reveal that competitors had "deployed their own extensive last-mile facilities for use in serving the enterprise market" in any of the MSAs at issue, including Phoenix.²³ In particular, the Commission held that data regarding network coverage "d[id] not approach the 75 percent

²⁰ See Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 20 (rel. Nov. 2006).

²¹ *In re Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 47 (2007) ("*Qwest 272 Sunset Order*").

²² *Id.*

²³ *In re Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd. 11729, ¶ 36 (2008) ("*4-MSA Order*").

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threshold relied upon by the Commission in the past.”²⁴ The Commission found that, in fact, “some of the competition from competitive LECs for enterprise services in these MSAs depends on access to Qwest’s own facilities, including UNEs.”²⁵

Qwest’s Petition offers no factual basis for revisiting these conclusions. None of the information proffered by Qwest regarding the “amount of fiber optic cable [that] has been placed by competitive service providers . . . in the Phoenix MSA”²⁶ shows that there is significant facilities-based competition in the business market in Phoenix. *First*, Qwest submits the number of Phoenix commercial buildings served by competitive fiber, as determined by GeoTel Communications, Inc. (“GeoTel”).²⁷ But there is no way to assess the reliability of the GeoTel evidence because Qwest does not provide the GeoTel study itself and offers scant information about the methodology utilized by GeoTel.

In any event, even under the analytical framework used in the *4-MSA Order*, the FCC rejected as unpersuasive Qwest’s proffer of GeoTel data very similar to the data provided in this proceeding.²⁸ The Commission’s rationale was that Qwest failed to provide any basis for comparing the GeoTel estimate of the number of commercial buildings served by competitors

²⁴ *Id.*

²⁵ *Id.*

²⁶ Petition at 30.

²⁷ See Petition at 30-31 & Attachment, Declaration of Robert H. Brigham ¶ 38 (“Brigham Decl.”) (stating that, according to GeoTel data from August 2008, “competitive fiber is now being used to serve over [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] buildings in the Phoenix MSA”).

²⁸ See *4-MSA Order* ¶ 40 & n.146 (“Based on GeoTel database, Qwest reports the number of buildings in each of the 4 MSAs that are served by competitive fiber.”).

with the total number of commercial buildings in Phoenix,²⁹ thereby rendering the GeoTel estimate meaningless. In fact, the Commission found instead that “the percentage of all commercial buildings that competitors serve with their own fiber facilities [in the four MSAs at issue] is *extremely small on a relative basis* – 0.17 percent to 0.26 percent.”³⁰ Here, Qwest again fails to provide any data with which to compare GeoTel’s estimate of commercial buildings served by competitive fiber in the Phoenix MSA as of August 2008.³¹ Furthermore, when that figure is compared to the total number of commercial buildings in the Phoenix MSA,³² Qwest’s estimate of the percentage of all commercial buildings served by competitive fiber is a mere [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent.

Second, Qwest submits (1) competitive fiber maps created by GeoTel; (2) the number of route miles on these networks, as reported by GeoTel; and (3) statements from competitors’ websites and press releases regarding fiber deployment.³³ But the Commission already rejected the same type of “assorted competitive fiber network data” in the *4-MSA Order*.³⁴ This is because the fact that competitors have deployed fiber *near* commercial buildings does not mean

²⁹ See *id.* ¶ 40 (holding that “Qwest d[id] not provide any comparative data for the number of buildings with demand for high-capacity services that Qwest serve[d]”).

³⁰ *Id.* (emphasis added) & n.147 (citing “GeoResults data” provided by competitors).

³¹ See Petition at 30-31 & Brigham Decl. ¶ 38.

³² See Letter from Brad E. Mutschelknaus et al., Counsel to Covad Communications Co. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, Attachment (filed Apr. 23, 2008) (showing that, according to GeoResults, Inc., there were 127,763 total commercial buildings in the Phoenix MSA as of March 25, 2008). This is the most recent estimate to which the Joint Commenters currently have access.

³³ See Petition at 30-31 & Brigham Decl. ¶¶ 38-44.

³⁴ *4-MSA Order* ¶ 39.

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that competitors can actually deploy loops *to* those buildings.³⁵ As the Commission recognized, even where buildings are located within 300 or 1000 feet of a competitor's fiber network, "it frequently would not be economically feasible to construct loops over that distance in the absence of a demand level that exceeds levels for which UNEs are available."³⁶ For this reason, Qwest's claim that "most 'unlit' buildings [in the Phoenix MSA] could be 'lit' simply by extending a lateral facility less than 1,000 feet from a fiber ring"³⁷ is completely unpersuasive.

The Joint Commenters' experience confirms that it is generally not economically feasible for competitors to deploy their own loop facilities and, as a result, there is little actual facilities-based competition in the business market in the Phoenix MSA. For example, as Integra's Senior Vice President of Network Engineering and Corporate Operations explains, in order to justify loop construction to a particular building, Integra must earn at least an approximate monthly recurring revenue of [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] for services provided to customers in the building, but Integra is unable to meet this revenue requirement in the majority of commercial buildings in which it serves customers.³⁸ Moreover, even where it is theoretically rational to construct loop facilities, Integra faces numerous obstacles associated with self-deployment, including lack of space in existing conduits and municipalities' increasing unwillingness to permit access to already overburdened

³⁵ See *id.* ¶ 36 & n.135.

³⁶ *Id.* n.135.

³⁷ Petition at 31 & Brigham Decl. ¶ 38.

³⁸ See Declaration Of Dave Bennett On Behalf Of Integra Telecom, Inc. ¶ 4 (Sept. 21, 2009) (attached hereto as Attachment B) ("Bennett Declaration").

public rights-of-way.³⁹ In the Phoenix MSA in particular, the cost of loop construction is higher than in other MSAs in which Integra offers service in part because some counties and municipalities charge substantial franchise fees for laying fiber.⁴⁰ As a result of these real-world obstacles to self-deployment, Integra has constructed loop facilities to only [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] buildings in the Phoenix MSA as of August 21, 2009.⁴¹

tw telecom has also found that there are many locations, including in the Phoenix MSA, where tw telecom cannot economically construct its own loop facilities. As explained in detail by tw telecom's Vice President of Business Operations, Scott Liestman, in order to determine whether it is cost-effective to deploy its own loop facilities, tw telecom conducts a build-buy analysis in which it assesses whether the revenue opportunity associated with a given building or customer is large enough to justify construction.⁴² As Mr. Liestman states, "the potential revenue must be sufficient to cover the total cost of construction and recurring expenses and simultaneously achieve a reasonable rate of return on investment."⁴³ Costs vary based not only on the distance between tw telecom's transport network and the customer location, but also on the costs associated with obtaining access to poles, ducts, conduits, rights-of-way, and commercial buildings, the type of services provided, and the customer's willingness to enter into

³⁹ See *id.* ¶ 5.

⁴⁰ See *id.*

⁴¹ See *id.* ¶ 6.

⁴² See generally Declaration Of Scott Liestman On Behalf Of tw telecom inc. (Sept. 21, 2009) (attached hereto as Attachment C) ("Liestman Declaration").

⁴³ *Id.* ¶ 5.

a longer-term contract.⁴⁴ After taking these factors into consideration, tw telecom is generally able to deploy loop facilities only to [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] customer locations. Indeed, as of July 2009, tw telecom had constructed loops to only [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] of its customer locations and to only [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] of the commercial buildings in the Phoenix MSA.⁴⁵

Moreover, based on its build-buy analysis for the Phoenix MSA, tw telecom has determined that it could theoretically build loop facilities to [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] of the buildings in the Phoenix MSA to which it has not already deployed loop facilities.⁴⁶ Thus, tw telecom, which serves predominantly medium and large businesses and likely deploys loop facilities at a faster pace than any other competitor, is unlikely to be able to justify deploying loops to the [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] of customer locations in the Phoenix MSA in the foreseeable future. As discussed, in its forbearance analysis, the Commission should presume that potential competition in the provision of wireline facilities is unlikely to be timely (i.e., occur within two years) or sufficient to constrain the incumbent from exercising market power. As Mr. Liestman's analysis confirms, the available evidence indicates that there is no basis for rebutting this presumption in the Phoenix business market.

⁴⁴ See *id.*

⁴⁵ *Id.* ¶ 5.

⁴⁶ *Id.* ¶ 8.

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B. There Are No Significant Alternative Sources Of Wholesale Loops For Carriers Serving Businesses In The Phoenix MSA.

In the *4-MSA Order*, the FCC found that the “record d[id] not reflect any significant alternative sources of wholesale inputs for carriers in the four MSAs.”⁴⁷ In an attempt to demonstrate the existence of wholesale competition from Cox in Phoenix, Qwest submitted information from Cox’s website into the record in the 4-MSA proceeding.⁴⁸ However, the Commission expressly held that it was “unable to determine . . . that Cox [wa]s a significant provider of wholesale enterprise services in [the Phoenix] MSA” based on that information.⁴⁹ Here, Qwest provides no basis for a contrary conclusion. Indeed, in support of the instant Petition, *Qwest proffers nothing but the very same pages from Cox’s website.*⁵⁰ Thus, Qwest’s claim that Cox is a significant alternative wholesale provider of loops and transport in the Phoenix MSA⁵¹ fails.

Integra’s experience confirms this conclusion. According to Integra executive Steve Fisher, Cox is not a viable alternative to Qwest for the wholesale loops needed to serve Integra’s business customers in Phoenix for several reasons.⁵² *First*, Cox offers wholesale loop customers access only to the relatively limited number of buildings served by Cox’s fiber loop facilities;

⁴⁷ *4-MSA Order* ¶ 37.

⁴⁸ See Letter from Melissa E. Newman, Vice President – Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 4-5 & nn.12-13 (filed May 22, 2008) (“Qwest May 22, 2008 Letter”).

⁴⁹ See *4-MSA Order* n.137 (citing Qwest May 22, 2008 Letter at 4-5).

⁵⁰ Compare Qwest May 22, 2008 Letter at 4-5 & nn.12-13 with Brigham Decl. ¶ 51 & nn.115-16.

⁵¹ See Petition at 33-34.

⁵² See Declaration Of Steve Fisher On Behalf Of Integra Telecom Inc., ¶¶ 7-8 (Sept. 21, 2009) (attached hereto as Attachment D) (“Fisher Declaration”).

Cox does not offer wholesale access to its coaxial loop facilities.⁵³ As a result, the geographic reach of Cox's wholesale loop offer is severely limited, and Cox does not provide wholesale loop substitutes for the conditioned copper loops and DS0 loops that Integra purchases from Qwest.⁵⁴ *Second*, Integra has found that Cox's prices for wholesale loop facilities are high in the limited number of locations in which Cox offers such facilities.⁵⁵ For instance, according to Mr. Fisher, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] *Third*,

Integra has found that Cox's wholesale OSS capabilities have serious limitations. For example, Cox is more likely to perform network maintenance during business hours, when residential usage is relatively low but business usage is obviously high.⁵⁷ Cox also does not allow wholesale customers to order loops via an electronic interface or offer electronic access to any other OSS functions. According to Mr. Fisher, all of these factors diminish Integra's ability to rely on Cox as a primary wholesale provider of loops.⁵⁸

Qwest's other "evidence" of purported wholesale competition in the business market in the Phoenix MSA must also be rejected. To begin with, none of the competitive wholesalers cited by Qwest has a network of significant reach. For example, while Qwest relies on statements from the websites of SRP Telecom ("SRP") and AGL Networks ("AGL") about their

⁵³ See *id.* ¶ 7.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See *id.* ¶ 8.

⁵⁸ See *id.* ¶ 9.

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extensive fiber networks,⁵⁹ the same statements indicate that those two firms, combined, reach only 114 commercial buildings in Phoenix.⁶⁰

Qwest cites to AboveNet, Inc.'s website for the fact that "[i]ts network reach includes over 1,300 lit buildings . . . *worldwide*,"⁶¹ but this tells us nothing about the extent of AboveNet's network reach *in the Phoenix MSA*. In addition, contrary to Qwest's claims,⁶² the fact that 360 Networks Corporation ("360networks") offers wholesale IP-based voice services in Arizona does not mean that 360networks can serve as a significant alternative source of wholesale loops in the Phoenix MSA.

While Qwest also asserts that XO's broadband wireless subsidiary, Nextlink, can serve as an alternative source of wholesale loops, the Commission already explicitly "decline[d] to find that Nextlink is a significant provider of wholesale enterprise services in [the Phoenix MSA]."⁶³ Qwest offers no basis for a contrary finding here. Indeed, Integra has not found *any* fixed wireless providers to serve as an alternative to Qwest for wholesale loops.⁶⁴ In Integra's experience, "fixed wireless providers cannot offer end-user connections at prices that are low

⁵⁹ See Brigham Decl. ¶¶ 52-54.

⁶⁰ See Petition at 34 ("the SRP network serves 50 on-net commercial buildings"); *id.* at 35 ("AGL's on-net building list for Phoenix . . . names 64 specific in-service or pending building locations in the Phoenix area").

⁶¹ See Brigham Decl. ¶ 61 (emphasis added).

⁶² See *id.* ¶ 62.

⁶³ 4-MSA Order n.137.

⁶⁴ Fisher Declaration ¶ 10.

enough or at levels of service quality that are sufficient to enable Integra to rely on those facilities to serve business customers.”⁶⁵

Finally, Qwest’s claim (*see* Petition at 37) that tw telecom “provides AT&T with a clear alternative to Qwest Special Access services in the Phoenix MSA” is unpersuasive. As explained above, tw telecom’s network only reaches a limited number of buildings in the Phoenix MSA, thereby rendering tw telecom at most a fringe competitor in the wholesale market.

C. There Is Very Limited Facilities-Based Retail Competition In The Business Market In The Phoenix MSA.

In the *4-MSA Order*, the FCC found that there was insufficient facilities-based retail competition in the business market to justify forbearance.⁶⁶ In the instant proceeding, Qwest offers nothing that would support a contrary finding. *First*, the survey conducted by the research firm Harte-Hanks submitted by Qwest⁶⁷ cannot be used to estimate competitors’ market share because it includes competitors that lease Qwest’s own loop facilities. As the Commission held in the *4-MSA Order*, “[w]hile Qwest can demonstrate a fair amount of retail enterprise competition using Qwest’s special access services and UNEs, consistent with the Commission’s precedent, competition that relies on Qwest’s own facilities is not a sufficient basis to grant forbearance from UNE requirements.”⁶⁸ For the same reason, the number of business lines that

⁶⁵ *Id.*

⁶⁶ *See 4-MSA Order* ¶ 36.

⁶⁷ *See* Petition at 27.

⁶⁸ *4-MSA Order* ¶ 41.

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Qwest provides to CLECs, “including [via] unbundled loops, [Qwest’s] QLSP [product] and resale,” is entirely irrelevant.⁶⁹

Second, Qwest cannot demonstrate that competition from Cox in the Phoenix retail business market is remotely sufficient to warrant forbearance. To begin with, Qwest’s reliance on a magazine article posted on Cox’s website for the proposition that Cox can provide DS1 service over its coaxial cable plant⁷⁰ is hardly credible. The article, published in *CED Magazine* in April 2004, merely describes equipment vendors’ rollout of “commercial services products that mine existing coax . . . to extend available DOCSIS channels” and that *could*, therefore, help cable operators penetrate the small and medium business market.⁷¹ The magazine article does not state or even imply that Cox provides DS1 service over coaxial loop facilities. In fact, when describing the revenue opportunity that Cox has in the small and medium business market, Bill Stemper, Vice President of Cox Business, is quoted in the article as saying, “We’re just scratching the surface.”⁷²

Qwest’s other “evidence” regarding Cox’s presence in the retail business market also cannot be credited. For example, while Qwest finds it “noteworthy that Cox was selected as the telecommunications vendor for the 2008 Super Bowl in Phoenix,” this fact is entirely irrelevant to whether Qwest faces sufficient competition in the retail business market in the Phoenix MSA to justify forbearance. Indeed, Integra has found that most of the competition it faces in the retail

⁶⁹ Petition at 29 (citing Exhibit 7 to Brigham Decl.).

⁷⁰ See Brigham Decl. ¶ 35 & n.67.

⁷¹ Jeff Baumgartner, “Extending HFC’s borders: MSOs are employing traditional and wireless technologies to reach small- and mid-sized businesses,” *CED Magazine* (Apr. 1, 2004).

⁷² *Id.*